

## COPYING FOR RELIGIOUS REASONS: A COMMENT ON PRINCIPLES OF COPYRIGHT AND RELIGIOUS FREEDOM

THOMAS C. BERG\*

This panel discussion on copyright and religious freedom focuses on the recent Ninth Circuit decision in *Worldwide Church of God v. Philadelphia Church of God*.<sup>1</sup> The decision, in my view, is a disturbing one. The Worldwide Church of God was at one time an exotic offshoot of Christianity that distributed magazines in New York's subways. In the 1980's, a new group of leaders lead the Church back toward more common Christian beliefs. The new leadership rejected the writings of the late previous leader, Herbert Armstrong, including his book *The Mystery of the Ages*,<sup>2</sup> which had been distributed widely to Church members. The Church ceased distributing the book and destroyed all but a few copies. Unsurprisingly, some Church members objected to this doctrinal about-face, adhered to Armstrong's teachings, and broke away to found a group called the Philadelphia Church of God. The Philadelphia Church did not have enough copies of *Mystery of the Ages* for its members' study and devotion, and it expected that the Worldwide Church would refuse to license copies of a book that it now regarded as heresy. So the Philadelphia Church made about 30,000 copies and distributed them free of charge. The Worldwide Church sued the Philadelphia Church to enjoin the copying as copyright infringement, and the Ninth Circuit agreed, awarding an injunction and damages.

The result of the Ninth Circuit decision is that a religious group rejected and suppressed a text that it had earlier led believers to rely on, and invoked copyright law to prevent those who continued to believe in the scripture from obtaining copies for their teaching and devotion. The result is disturbing on both grounds of copyright law and religious freedom. This concern that copyright law can be misused to suppress religious disagreement is the subject of this panel. *Worldwide Church of God* is, however, only one of a growing number of cases that involves disputes over the copy-

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\* Professor of Law, University of St. Thomas School of Law (Minneapolis); Co-Director, Institute for Catholic Thought, Law, and Public Policy.

<sup>1</sup> 227 F.3d 1110 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001).

<sup>2</sup> HERBERT W. ARMSTRONG, *MYSTERY OF THE AGES* (1st Books Library 2003).

ing of religious texts by defendants who claim a religious need to use them.<sup>3</sup> As it turns out, the interplay of copyright and religious freedom raises complex and fascinating issues. I want to outline briefly my thoughts on two aspects of the problem.

#### I. WHY RELIGION-SPECIFIC EXEMPTIONS FROM COPYRIGHT ARE UNLIKELY – BUT NOT UNTHINKABLE

My first thesis is this: While protection of the interests of some religious users, such as the Philadelphia Church is justified, it is more likely to come through copyright law itself than through an independent claim of religious freedom. Therefore, in a case where copyright law prohibits the copying by a religious user, courts are unlikely to declare any exemption to the copyright on religious freedom principles. In fact, courts should be relatively reluctant to declare such an exemption. Making that statement pains me some, since overly broad copyright claims can conflict with religious freedom, and because I generally defend the idea of exempting religious exercise from some laws in order to preserve religious freedom.<sup>4</sup> But, for a multitude of reasons, free exercise exemptions are particularly unlikely with respect to copyright law.

However, there are some caveats with respect to each of these reasons. Broad liability for copyright infringement can interfere with religious freedom. Such interference can generally be prevented by proper interpretation of copyright law, in particular the fair use doctrine. Part II presents the copyright-based arguments for shielding certain religious uses. But if copyright law is not up to that task if liability doctrines are interpreted too broadly, and defenses such as fair use too narrowly, then a religious-use exemption may occasionally be necessary.

##### A. *Protection of Religion Through Religion-Neutral Doctrines: The Fair Use Defense*

The first reason why religious exemptions from copyright law are unlikely is that copyright law itself contains a number of doctrines that can be used to protect religious freedom. Most importantly, the fair use defense, section 107 of the Copyright Act, protects many of the kind of uses of a text that a religious defen-

<sup>3</sup> See DAVID NIMMER & MELVILLE NIMMER, NIMMER ON COPYRIGHT § 1.10[E], at 1-160 (1978 & Supp. 60) (noting a recent “bumper crop of religious issues litigated in copyright guise.”).

<sup>4</sup> See Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They are Wrong*, 21 CARDOZO L. REV. 415 (1999) [hereinafter *New Attacks on Religious Freedom Legislation*]; Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693 (1997).

dant would make, including “criticism,” “comment[ary],” “teaching,” “nonprofit educational” or noncommercial uses in general.<sup>5</sup> The first three of these are among the examples of common fair uses in the first part of the statutory section. The last is found in the first of four factors that section 107 directs courts to apply in every fair use case. Moreover, the fair use analysis encompasses a number of factors that potentially allow the distinctive needs of a religious user to be considered in a particular case. Section 107 states that the four factors should be applied to determine “whether the use made of work in any particular case is a fair use,”<sup>6</sup> and the case law confirms that a wide range of facts may be considered in any fair use case. The Supreme Court, for example, has emphasized that fair use is an equitable rule of reason, and that “each case raising the [fair use] question must be decided on its own facts.”<sup>7</sup>

It is instructive to contrast the copyright issue with the Third Circuit’s decision in *Fraternal Order of Police v. Newark*.<sup>8</sup> In that case a Muslim police officer, who was religiously obligated to wear a beard, successfully challenged the police department’s policy forbidding officers to have facial hair. The Department had an exception allowing facial hair worn for medical reasons. The court held that religious reasons had to receive the same degree of solicitude; they had to be protected as long as they did not undermine the Department’s goal of having neatly attired officers any more than did the medical exception.<sup>9</sup> Otherwise, the court held, following the Supreme Court’s reasoning in *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>10</sup> the department would be “devalu[ing] religious reasons for [acting] by judging them to be of lesser import than nonreligious reasons” and so would be “singl[ing] out [religious practice] for discriminatory treatment.”<sup>11</sup>

In *Fraternal Order of Police*, the existing statutory exemption could not encompass a religious need, providing religious needs with the same degree of protection a judicially mandated exemption under the Free Exercise Clause required. By contrast, in the copyright context there are several ways in which the distinctive

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<sup>5</sup> 17 U.S.C. § 107 (1992).

<sup>6</sup> *Id.*

<sup>7</sup> *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 448 n.31 (1984); *see also Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 552 (1985) (“[F]air use analysis must always be tailored to the individual case.”) (citations omitted).

<sup>8</sup> 170 F.3d 359 (3d Cir. 1999).

<sup>9</sup> *See id.* at 365-66.

<sup>10</sup> 508 U.S. 520 (1993).

<sup>11</sup> *Fraternal Order of Police*, 170 F.3d at 364-65 (quoting *Church of the Lukumi*, 508 U.S. at 537-38) (italics in original omitted).

needs and circumstances of religiously motivated users can be fit into the fair use framework, to ensure that religiously motivated users receive the same protection as comparable secular uses. Part II discusses these fair-use arguments.

For these reasons, it can be argued that there is little room for religious-use exemptions beyond what would already be protected as a statutory fair use. The Supreme Court has staunchly maintained, in *Eldred v. Ashcroft*<sup>12</sup> and *Harper & Row Publishers v. Nation Enterprises*<sup>13</sup> that the constitutional right of free speech does not require any more protection than what the fair use doctrine and the idea/expression dichotomy provide.<sup>14</sup>

However, the argument that the fair use defense sufficiently shelters religiously motivated uses comes with some caveats. First, I have treated the case-by-case nature of the fair use inquiry as a reason why it can accommodate religious freedom sufficiently. However, this case-by-case approach may actually trigger stricter constitutional scrutiny when a claim of religious freedom is invoked. The landmark Supreme Court decision in *Employment Division v. Smith*<sup>15</sup> eliminated or severely cut back exemptions for religious practice from “neutral laws of general applicability,”<sup>16</sup> thus focusing attention on whether the law in question treats religious practice worse than it does comparable conduct not motivated by religion. But *Smith* indicated that strict judicial scrutiny would still apply, and exemptions would remain likely, in contexts involving “individualized governmental assessment of the reasons for the relevant conduct[;]” “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”<sup>17</sup> On this basis, the Court indicated that unemployment-benefits claimants whose religious tenets made them unable to take certain kinds of work—and therefore disqualified them from benefits under state statutes—could continue to succeed on free exercise claims for benefits, as they had before *Smith* in decisions like *Sherbert v. Verner*.<sup>18</sup> Fair use claims are also subject to “individualized assessment” so it

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<sup>12</sup> 537 U.S. 186 (2003).

<sup>13</sup> 471 U.S. 539 (1985).

<sup>14</sup> See *Eldred*, 537 U.S. at 219 (noting that “copyright law contains [these two] built-in First Amendment accommodations.”). See also *Harper & Row*, 471 U.S. at 560 (“[Given, among other things,] the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.”).

<sup>15</sup> 494 U.S. 872 (1990).

<sup>16</sup> *Id.* at 879.

<sup>17</sup> *Id.* at 884.

<sup>18</sup> 374 U.S. 398 (1963).

might be argued that religious exemptions from copyright should be granted liberally, whenever the fair use defense fails to extend to a particular set of facts. *Smith* says that there must be a “compelling reason” to refuse such an extension in a case of “religious hardship.”

Although this argument should be taken seriously, there is a significant difference between the fair use defense and other cases of “individualized assessments.” Again, the fair use doctrine has the potential to be highly flexible in accommodating the range of religious uses that are likely to conflict with copyright, including religious teaching, religious commentary, and so forth. In *Sherbert*, by contrast, although the unemployment statute permitted refusing work for “good cause,” the state courts had effectively determined that Sabbatarian religious scruples were not “good cause” for refusing work on Saturday, and had therefore made it impossible to accommodate a significant class of religious objections within the terms of the statute.<sup>19</sup> A judicially declared exemption was therefore necessary, as it was in *Fraternal Order of Police*, in order for religious conscience to receive the same degree of consideration that other important personal reasons for acting received.

That brings us to the key point, and the second significant caveat: The capacity of the fair use defense to accommodate religious uses depends on the strength of the fair use defense.<sup>20</sup> Unfortunately, fair use recently has appeared to be in an increasingly weakened state. Part II will discuss how religiously motivated users can most effectively employ the fair use defense.<sup>21</sup>

There is one final reason why the presence of the religion-neutral fair use defense, though important, is not the end of the story. The availability of religion-neutral accommodation might be conclusive under the “formal neutrality” approach of *Employment Division v. Smith*. But it is far less conclusive if the governing approach is strict scrutiny for all claims of a “substantial burden” on

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<sup>19</sup> See *id.* at 398.

<sup>20</sup> See generally Renae S. Kelderman, *You Cannot Hide Behind Religion in Copyright Law: The Ninth Circuit Correctly Rejected a Religious Extension to the Fair Use Defense in Worldwide Church of God v. Philadelphia Church of God, Inc.*, 35 CREIGHTON L. REV. 1107, 1108-09 (June 2002); Chris Heinss, *Beyond the Smoke and Mirrors: Defending the Urge to Nullify or Glorify Religious Copyright Law*, 33 CUMB. L. REV. 677, 705 (2002-2003).

<sup>21</sup> It might also be argued that although fair use and other limits on copyright liability effectively implement free speech values, see *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985), it does not follow that these doctrines also implement the distinct value of freedom of religious exercise. To this it could be responded that in the copyright context, religious exercise largely takes the form of speech or expression and therefore the predominant category of protection should be free speech (and its proxy, the copyright doctrines). See *infra* Part I.D.

religion – whether generally applicable laws or not – as is the case with the federal Religious Freedom Restoration Act (“RFRA”).<sup>22</sup> Although RFRA was invalidated in its application to state laws,<sup>23</sup> subsequent decisions strongly indicate that it remains applicable to federal laws and regulations,<sup>24</sup> such as the Copyright Act.<sup>25</sup>

Therefore, I turn to some additional reasons why special religious exemptions from copyright law are likely to be infrequent.

### B. *Copyright as a “Baseline” Private Right*

A second consideration is that infringement of a copyright involves a direct invasion of the interest of a particular individual, the copyright owner. Thus, infringement may transgress the basic framework of others’ rights that defines limits on religious freedom, even under a regime in which religion is exempt from some generally applicable laws. Again, compare the copyright situation with a leading free exercise decision, *Wisconsin v. Yoder*,<sup>26</sup> where Amish parents were exempted from sending their teenage children to high school and thereby exposing them to secularizing influences. The state’s purpose in *Yoder* was not to block a direct invasion of the person or property of any particular individual outside the Amish community. Rather, the state sought to prevent the harm that would occur to society if Amish children’s lack of schooling made them unable to support themselves.<sup>27</sup> The Court correctly viewed this claim of harm as indirect, diffuse, and distant, and after subjecting it to close scrutiny, concluded that the state’s fears were not sufficiently supported by evidence.<sup>28</sup>

However, it is another matter when a specific individual’s interests are directly invaded. As I have argued previously, the theory of free exercise should differentiate between “direct harms to specific, non-consenting third parties and abstract harms that filter

<sup>22</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1-7 (1993) (providing that whenever religious exercise is substantially burdened, the government must show that the burden is the “least restrictive means” of accomplishing a “compelling governmental interest”).

<sup>23</sup> See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>24</sup> See, e.g., *In re Young*, 141 F.3d 854 (8th Cir. 1998); *United States v. Ramon*, 86 F.Supp.2d 665, 677 (W.D. Tex. 2000).

<sup>25</sup> See *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1112 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001) (assuming the validity of RFRA as applied to the copyright case, but finding no substantial burden on religion).

<sup>26</sup> 406 U.S. 205 (1972).

<sup>27</sup> See *id.* at 224 (considering whether Amish children lacking a high school education would be “ill-equipped for life” and “would become burdens on society because of educational shortcomings.”).

<sup>28</sup> See *id.* at 234 (finding no evidence that keeping children out of high school “results in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.”).

throughout society.”<sup>29</sup> Focusing on the former as defining the limits of religious freedom is consistent with the historical understanding of the concept. James Madison, a staunch defender of free exercise protection, stated that free exercise should prevail unless it “trespass[es] on [among other things] private rights.”<sup>30</sup> It is also consistent with religious freedom as a libertarian sort of right: an individual can make his own choices or decisions with respect to religious practice, up to the point where they directly harm another specific, non-consenting individual.<sup>31</sup> And under modern case law, the Supreme Court held that religious exemptions imposing “substantial burdens” on others are not only not constitutionally required, but in at least some cases are constitutionally forbidden.<sup>32</sup> Use of copyrighted material certainly qualifies as a direct effect on the interests of an identifiable individual, the copyright holder.

Again, however, this argument must be significantly qualified. The legislature or courts might define virtually anything as a “private right” in Madison’s words;<sup>33</sup> almost any action could be characterized as invading the rights of a specific individual. For example, an exemption for religiously affiliated schools from mandatory collective bargaining laws might be seen as invading each employee’s individual right to try to unionize. Even the exemption from compulsory school laws for Amish teenagers could be characterized as invading a right of voters or taxpayers to be free from the effects of uneducated members of society. With such redefinitions, legislatures or courts could overcome free exercise at will (at least whenever the law in question does not target religion for regulation). My view is that “private rights” in the Madisonian sense means those historic libertarian, largely common-law rights

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<sup>29</sup> Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 38 (1994); accord Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 332-35 (arguing for similar distinction in analysis between “private” harms to individuals and “public” harms to society more generally).

<sup>30</sup> Letter from James Madison to Edward Livingston (July 10, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed. 1910), available at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions66.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions66.html) [hereinafter Letter from Madison].

<sup>31</sup> For arguments on religious freedom as a libertarian sort of right, see *New Attacks on Religious Freedom Legislation*, *supra* note 4, at 430-31; see also Berg, *supra* note 29 at 38-40.

<sup>32</sup> See *Estate of Thornton v. Caldor Inc.*, 472 U.S. 703, 709-10 (1985) (striking down law requiring employers to accommodate Sabbath observers on ground that it imposed “significant burdens” on employers and on other employees who had to work in their place); see also *Tex. Monthly v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989) (Brennan, J., plurality opinion) (arguing that sales-tax exemption limited to religious publications was unconstitutional because it led to additional tax burden on non-beneficiaries).

<sup>33</sup> See Letter from Madison, *supra* note 30.

of property, contract, and tort that the Framers would have taken for granted as the basic framework limiting one's freedom of action. Such a framework makes sense because it "specifically aims to recognize a considerable scope of freedom for the actor – by giving her control over her own body and property – while at the same time defining limits on that freedom in order to protect the bodily and property rights of others."<sup>34</sup>

Does copyright fit into this category? It might indeed. It was obviously well known to the Framers, and they gave Congress the power to "secure," rather than create, an author's copyrights. Such phraseology suggests they viewed copyright as a preexisting right founded in common law and natural law, as part of the baseline of individual rights. In Federalist No. 43, Madison (perhaps erroneously) identifies copyright as a right at common law.<sup>35</sup>

On the other hand, copyright, as a form of intellectual property, differs from other kinds of property, tangible and intangible, in two familiar ways. First, the framing generation may have been far from unanimous in viewing copyright as a full-fledged natural right of the author. An equal, if not dominant theme in Anglo-American copyright jurisprudence is the notion that copyright exists to provide incentives for the production of works by making it possible for authors to capture revenues from them – a theme reflected in the Constitution's statement that copyright's purpose is "to promote the Progress of Science."<sup>36</sup> Second, intellectual property, such as copyright, differs from other forms of property in that it is "nonrivalrous."<sup>37</sup> When I use your car I prevent you from using it, but when I copy your text I do not prevent you from using it. At most I deprive you of revenue that you could have gained, perhaps revenue that would have been crucial to recouping your costs of creating the text in the first place (that, of course, is the scenario underlying the "author's incentive" rationale for copyright). Therefore, it may make sense, both morally and economically, to

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<sup>34</sup> *New Attacks on Religious Freedom Legislation*, *supra* note 4, at 430-31.

<sup>35</sup> "The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law." THE FEDERALIST NO. 43, at 288 (James Madison) (J. Cooke ed., 1961). If Madison meant to state the governing rule, he was mistaken, because the House of Lords in 1774 had ruled that copyright in published works was a creature of statute only. *See* *Donaldson v. Beckett*, 1 Eng. Rep. 837 (H.L. 1774). *Donaldson* overturned *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769), in which the King's Bench had held that common law protected a perpetual copyright in published works.

<sup>36</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>37</sup> For just the most recent of the many reflections on that feature of intellectual property, *see* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 907 (2002).



recognize less expansive property rights in intellectual creations, and a more expansive scope for the public to use such materials.

This brief article cannot begin to seriously address the question whether copyright and other forms of intellectual property are truly analogous to other property claims in their nature and status. For now, I can only note what this question might imply for religious claims to exemption from copyright law. The two features of intellectual property that distinguish it from other "property" may mean that some copyright claims do not fit into that category of baseline rights that, under my premise, should limit the scope of religious freedom. Even so, many instances of copyright infringement could still comfortably fit within that baseline. Those are uses of the work that cause the copyright owner to lose economic revenue in the "normal market" for the work<sup>38</sup> – revenue of the kind that he or she would have contemplated in creating the work. These "core" claims of copyright infringement fit comfortably within both rationales for copyright – Madison for one thought so<sup>39</sup> – and seem to fall within the basic structure of private rights that should delimit the scope of religious freedom.

### C. *The Competing Claims of Religious Freedom*

There is another argument against exempting religiously motivated infringements from copyright liability even if one regards private persons' religious activity as enjoying special constitutional protection (which is the general premise that underlies religious exemptions from general laws). In the majority of such cases, not just the defendant but also the plaintiff, the copyright owner, is engaged in religious activity. So far as I know, every reported case of religiously motivated copying involves a religious work and a religious copyright owner, such as in the *Worldwide Church of God*.<sup>40</sup> In the real world these are always interreligious disputes, which raise distinct legal concerns.

First, if one were to exempt religiously motivated uses wholesale from copyright rules, it would have a detrimental effect on other religious groups, such as religious copyright owners. Not all of the classes affected would be religious authors or groups, but the vast majority would; the effect would be highly disproportionate on

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<sup>38</sup> See PAUL GOLDSTEIN, COPYRIGHT § 10.2.2, at 10:62 (2d. ed. Supp. 2002).

<sup>39</sup> After noting that copyright had been declared an author's right at common law, Madison, in the *Federalist*, went on to assert that "[t]he public good fully coincides in [copyright and patent] with the claims of individuals." THE FEDERALIST NO. 43, *supra* note 35, at 2880.

<sup>40</sup> 227 F.3d 1110 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001).

religion. It would be quite close to a rule singling out copyright owners for lesser rights if they or their works were religious – a rule that would almost certainly be struck down as a free exercise violation under the “neutrality” approach of *Employment Division v. Smith*<sup>41</sup> and later decisions.<sup>42</sup>

Second, the interreligious nature of most religious copyright disputes makes the distinct line of First Amendment decisions concerning internal church disputes relevant to this situation. More than a decade before *Employment Division v. Smith* allowed the application of religion-neutral laws generally, the Court in *Jones v. Wolf*<sup>43</sup> allowed the application of “neutral principles of law” to conflicts between church factions over who controls the building and other real property. The decision in *Jones* provoked far less controversy than did *Smith*, partly because *Jones* could be defended as respecting the free exercise rights of each side of the dispute by permitting (if not encouraging) the courts to apply religiously neutral laws that were applicable to property disputes in general and thus less likely to favor one of the religious factions.<sup>44</sup>

Again, however, there are counterarguments to this point. First, as already noted, a religious-users exemption does not by its terms single out religious authors and works for lesser rights than their nonreligious counterparts. But the effect on religious authors and works may be so disproportionate, so close in fit to a facial discrimination against them, that it counts as a factor against the religious-user exemption.

Second, it can be argued that when religious uses are exempted, it is not the federal court that is burdening the copyright holder’s religious exercise, but rather the private defendant – that the federal government is merely permitting that privately imposed burden. To hold that any exemption from a private cause of action *ipso facto* burdens the private plaintiff eliminates all religious exemptions from such laws. In a somewhat similar situation, the

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<sup>41</sup> 494 U.S. 872 (1990).

<sup>42</sup> See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (holding that a law that singles out a practice for restriction when it is religiously motivated is not neutral or generally applicable and is nearly always invalid); see also *Smith*, 494 U.S. at 877 (government may violate free exercise if it “ban[s] such acts or abstentions only when they are engaged in for religious reasons.”).

<sup>43</sup> 443 U.S. 595 (1979).

<sup>44</sup> See *Jones*, 443 U.S. at 603-04 (arguing that by employing neutral principles of property law, “a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of its members.”). See generally Arlin M. Adams and William R. Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291 (1980) (arguing that neutral principles approach in church property disputes is most consistent with state evenhandedness between religious groups).

Court in *Corporation of Presiding Bishop v. Amos*<sup>45</sup> upheld the exemption of religious organizations from Title VII liability for religious discrimination in employment on the theory that “[a] law is not unconstitutional simply because it allows churches to advance religion . . . . For a law to have forbidden ‘effects’ [of ‘advancing’ religion], it must be fair to say that the government itself has advanced religion through its own activities and influence.”<sup>46</sup>

Indeed, it can be argued further that a religious-use exemption does not burden the copyright holder’s religious exercise because it leaves the holder free to use the work and merely prevents him from excluding others’ use. With a copyright exemption, unlike with a judgment of infringement, the government does not suppress anyone’s speech or activity. And an exemption might be said to preserve evenhandedness between the competing religious groups – not to depart from it – because it allows both groups to use the work for their religious purposes of study or evangelism. Even if the two groups are in a religious rivalry, their simultaneous uses are “nonrivalrous” in economic terms. This of course distinguishes the dispute over copyright from the dispute over the church building and grounds, which cannot be shared by the two factions. Thus, as Tom Cotter points out, if the primary goal of religious freedom is to encourage the airing of many varying religious views – to let a thousand different religious lilies bloom – then a fairly liberal policy of allowing use by both factions seems the proper course.<sup>47</sup>

However, this leaves out the other side of the equation, at least for some copyright cases. The copyright plaintiff may be able to demonstrate that the infringement causes lost demand for the work – and exhaustion of demand – among the very audience for which the author intended to create the work.<sup>48</sup> In such a case, a religious-use exemption could quite fairly be said to burden the religious plaintiff, for the reasons already discussed at length in the previous section.<sup>49</sup> The statement in *Amos* that allowing religious actors is not unconstitutional promotion must be read in the light

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<sup>45</sup> 483 U.S. 327 (1987).

<sup>46</sup> *Id.* at 337.

<sup>47</sup> See Thomas F. Cotter, *Accommodating the Unauthorized Use of Copyrighted Works for Religious Purposes Under the Fair Use Doctrine and Copyright Act § 110(3)*, 22 CARDOZO ARTS & ENT. L.J. (forthcoming 2004) [hereinafter *Use of Copyrighted Works for Religious Purposes*]; see also Thomas F. Cotter, *Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 333 (2003) [hereinafter *Gutenberg’s Legacy*].

<sup>48</sup> I will say more in Part II about precisely what effects on the demand for the work should count against a religious use. It is a complicated and subtle question. See *infra* Part II.B.

<sup>49</sup> See *supra* Part I.B.

of other decisions that conclude that some exemptions do burden other private parties.<sup>50</sup> Finally, the issue here is not whether the effects on religious plaintiffs are enough to make a religious-use exemption invalid, but rather whether they are enough to keep the exemption from being constitutionally required. At least when there is a showing of harm to work in the form of significant lost demand among the primary contemplated audience – the normal market – it seems doubtful that religious freedom principles should lead courts to depart from copyright law in favor of the religious defendant as against the religious plaintiff.

#### D. *Copyright and Speech*

A final argument against exemptions from copyright law is that the activity at issue in a copyright dispute is typically speech or expression. Some commentators have argued that even if it is generally permissible to give distinctive exemptions to religiously motivated conduct, it is impermissible – or at least not required – to exempt speech with religious content or motivation while speech with secular content or motivation remains subject to the law.<sup>51</sup> The theory underlying this argument is that the equal treatment of varying ideas and belief systems is particularly important to the Free Speech Clause,<sup>52</sup> where the jurisprudence has come to emphasize the government's maintaining content neutrality and avoiding distortions of the marketplace of ideas. The Supreme Court decisions have never addressed this point exactly. But the Court has held that unique protection for freedom of religious expression is not required by the Free Speech Clause,<sup>53</sup> and that governmental rules discriminating against religious speech infringe on free speech rights.<sup>54</sup> In addition, a concurrence in *Texas Monthly v. Bullock*<sup>55</sup> argues that the problem with the sales-tax exemption for religious publications that was invalidated in that case was that the exemption discriminated against secular publications in violation

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<sup>50</sup> *Id.*

<sup>51</sup> See, e.g., Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605 (1999); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection, and Free Speech Concerns*, 56 MONT. L. REV. 227, 244-47 (1995); Eugene Volokh, *Intermediate Questions of Religious Exemptions – A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 610-13 (1999).

<sup>52</sup> U.S. CONST. amend. I.

<sup>53</sup> See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

<sup>54</sup> See *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001); *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995); see also *Pinette v. Capitol Square Review & Advisory Bd.*, 515 U.S. 753 (1995); *Lamb's Chapel v. Ctr. Moriches School Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

<sup>55</sup> 489 U.S. 1 (1989).

of the Free Press Clause.<sup>56</sup>

If this theory is sound, then religious-use exemptions from copyright laws must be eliminated or severely limited. The copyright defendant's activity is by definition speech or expression, so to exempt this activity when it is religious in content or motivation would be impermissible, or at least not required.

I have doubts about this theory, however, since it reduces religious speech simply to speech, and eliminates the distinct ground of protection in the Free Exercise Clause. Religious speech is treated differently when it is utilized by the government. It is treated less favorably in that the Establishment Clause prohibits it, and in that light it is not anomalous to have a corresponding special protection for religious speech by private individuals. As the Court stated in *Lee v. Weisman*:<sup>57</sup> "The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."<sup>58</sup> This is a special constitutional structure for religion, and while it calls for special restriction on government religious speech, it also calls for private groups to have special "freedom to pursue [their religious] mission."<sup>59</sup>

The issue of special freedom for religious speech has not yet been decided under the Religious Freedom Restoration Act, the most likely source for a religious-use exemption from copyright law.<sup>60</sup> The legislative history reflects a compromise limiting, but not doing away with special claims for religious speech: "[W]here religious exercise involves speech, as in the case of distributing religious literature, reasonable time, place, and manner restrictions are permissible consistent with First Amendment jurisprudence."<sup>61</sup> Copyright is not a mere time, place, or manner restriction, so this provision does not apply. On the other hand, courts might hold that the government has a compelling interest under RFRA in denying exemption to maintain neutrality between religious and other speech, or more directly that the Free Speech Clause forbids a RFRA exemption for religious speech.

If religious-use exemptions do not violate the Free Speech Clause, then there may be room for such exemptions, but they may

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<sup>56</sup> See *Tex. Monthly*, 489 U.S. at 25-26 (White, J., concurring).

<sup>57</sup> 505 U.S. 577 (1992).

<sup>58</sup> *Id.* at 589.

<sup>59</sup> *Id.*

<sup>60</sup> See *supra* notes 15-18 and accompanying text.

<sup>61</sup> Religious Freedom Restoration Act of 1993, S. REP. NO. 103-11, at 13 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1903.

still be subject to the significant constraints already discussed in previous sections.<sup>62</sup> If such exemptions do violate free speech principles, then most if not all protection for religious uses will have to come from the Copyright Act itself and its defenses. Part II of this Article concentrates on those statutory provisions, in particular the fair use defense.

E. *Summary of the Constitutional Issues: Religious Exemptions and the Problem of Theological Determinations in Copyright*

To summarize the constitutional analysis so far: When all of the above reasons are added together, courts are not likely to, and probably should not, mandate many religious-user exemptions from copyright law under RFRA or the Free Exercise Clause. Such exemptions run into a number of difficulties: they may impede one religious group's practice as they protect another's, they may undercut a basic right to be free from direct harm by another, they may violate free speech notions of viewpoint neutrality, and perhaps most important, they will be largely unnecessary if copyright doctrines such as fair use already offer the protection that they should.

But along with each of the above reasons there come significant caveats and misgivings. Broad copyright liability can impinge on religious freedom; the *Worldwide Church of God* case is an example.<sup>63</sup> The caveats in the discussion suggest that religious-user exemptions remain a possibility in some cases where (1) the defendant's use does not cause a "core" harm to the copyright owner's return of the sort described above, but nevertheless (2) the fair use defense or other copyright doctrines fail to protect the use.

Before turning to arguments under the Copyright Act, however, there is an additional constitutional argument against applying the Act's terms. Copyright raises constitutional difficulties because it calls on courts to make evaluations that in the case of a religious work or religious use, take on a highly theological character. Consider several examples:

(i) Suppose that a defendant asserts that he needs to use the entire work in question, not simply a portion of it, because it is his scripture and its every word is fraught with inspired meaning. The fair use doctrine generally calls on the court to evaluate, among

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<sup>62</sup> See *supra* Parts I.A-C.

<sup>63</sup> *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001).

other things, “whether the defendant has taken more than is necessary to satisfy the specific fair use purpose,”<sup>64</sup> whether that be journalism, criticism, parody, or something else. Can a court legitimately question the defendant’s assertion that he needs to use the entire work for his religious purposes because it is his scripture? Or suppose the defendant uses a small amount of a religious work but the plaintiff claims that it is the “essence of the work,” which if true would cut against fair use.<sup>65</sup> How can a court evaluate that claim?

(ii) Suppose that defendant asserts that because the words of the work are divinely inspired, it must use the verbatim words and not just paraphrase them. Ordinarily the plaintiff can stop others from using the verbatim words but not a paraphrase, but if the verbatim words are crucial to expressing the underlying idea – if, in copyright parlance, the idea and expression “merge” – then plaintiff cannot stop their use. Can a court evaluate whether a particular expression in a religious work is crucial to the underlying idea?

(iii) “Factual” works get less protection from copyright than do “creative” works. This is true under both the idea-expression doctrine<sup>66</sup> and the fair use defense.<sup>67</sup> Suppose that the defendant argues, “The precise words of this text refer directly to realities that, although spiritual, are just as objective and constraining as the realities of science or of history. Therefore I must use exactly, or almost exactly, the same words, since we are talking about facts here, not just creations of the human mind.”<sup>68</sup> The plaintiff re-

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<sup>64</sup> MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 10.9, at 438 (1998).

<sup>65</sup> *Id.* at 439 (noting that “[q]uestions of amount and substantiality have a qualitative, as well as a quantitative, dimension.”). In the most notable example, the Supreme Court held that the copying of 300 words from a 200,000-word forthcoming manuscript of President Ford’s memoirs was not fair use, in part because these pages were “essentially the heart of the book.” *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 564-65 (1985) (quotation omitted).

<sup>66</sup> See PAUL GOLDSTEIN, COPYRIGHT § 8.4.1.4, at 113 (“Courts generally give copyrighted historical works a limited range of protection against admittedly similar works on the ground that both works are mining the same historical vein and necessarily refer to the same facts.”).

<sup>67</sup> See *id.* § 10.2.2.2, at 226-27 (noting that courts give “greater scope” to fair use for factual than for creative works on the grounds that “the enforcement of rights in factual works poses a greater risk of inhibiting the free flow of information than does the enforcement of rights in fictional entertainments” and that “extensive verbatim quotation [may be] necessary to preserve the accuracy of the information conveyed.”).

<sup>68</sup> Note that here the argument is made by a defendant who is copying the work for religious reasons – that is, because he views it as necessary scripture. In other fair-use cases, the defendant, though trying to characterize the work as a “fact work” or an “essential idea,” would not be trying to claim that this is because the work is scripture. For example, in the *New Era Publications* case below, the defendant was writing a critical biography of Hubbard the religious leader. See *New Era Publ’ns Int’l v. Carol Publ’g Group*, 904 F.2d 152 (2d Cir. 1990).

sponds that the scripture is an “imaginative” rather than literal portrayal of spiritual truths and so does not need to be copied verbatim or extensively. Can a court resolve the dispute whether a religious scripture is factual or creative?

There is nothing outlandish in these hypothetical assertions that a scripture is “factual” or must be copied verbatim. Many religious adherents believe that their scriptural texts are precisely accurate because they are divinely inspired. Most Protestant evangelicals and fundamentalists make such assertions,<sup>69</sup> and traditional Muslims emphasize that the text of the Koran has not been altered in the 1500 years since its composition.<sup>70</sup>

In each of these situations, the court is asked to make an evaluation that involves passing on theological issues. Several doctrines and lines of decisions hold that it is improper for a court to resolve a legal dispute on the basis of the court’s interpretation of, or independent judgment on, a religious or theological concept. Clearly, a civil court may not decide whether a religious work is “factual” or “imaginative” in the sense of literally true versus only metaphorically true. *United States v. Ballard*<sup>71</sup> established long ago that courts and juries may not determine the truth of religious beliefs: “Heresy trials are foreign to our Constitution. Men . . . may not be put to the proof of their religious doctrine or beliefs.”<sup>72</sup> Nor can a court easily undertake to decide what elements of a religious scripture are its “essence” or are necessary to its use.<sup>73</sup> *Employment Division v. Smith* emphasizes that, even for the purpose of protecting religious freedom, courts must not “question the centrality of particular beliefs or practices to a faith” or “presume to determine the place of a particular belief in a religion.”<sup>74</sup> In general, the Court says in numerous contexts that judges should not resolve disputes “on the basis of [interpretations of] religious doctrine and practice[;]”<sup>75</sup> that “[t]he judicial process is singularly ill equipped to resolve . . . differences” over religious texts, and that “[c]ourts are not arbiters

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<sup>69</sup> See Robert Longman, Jr., *Words About the Bible: inerrant, infallible, indelible, literal*, at <http://www.spirithome.com/scrip6.html> (last visited July 24, 2003).

<sup>70</sup> See Al Habtoor Group, *The Final Mission: Are We All Believers* (July/August 2001) (stating that “the Koranic text has not been altered from its first inscription.”), available at [http://www.alshindagah.com/july2001/the\\_final\\_mission.html](http://www.alshindagah.com/july2001/the_final_mission.html); see also Bill Broadway, *Looking for Answers in Islam’s Holy Book*, WASH. POST, Sept. 29, 2001, available at <http://www.themodernreligion.com/terror/wtc-quran-answers.html> (noting that the Koran was written 1,500 years ago).

<sup>71</sup> 322 U.S. 78 (1994).

<sup>72</sup> *Id.* at 86.

<sup>73</sup> See *supra* Part I.E, example (i).

<sup>74</sup> *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) (quotations omitted).

<sup>75</sup> *Jones v. Wolf*, 443 U.S. 595, 602 (1979).



of scriptural interpretation.”<sup>76</sup> These strictures have affected court rulings in many different areas, including the rejection of claims that a church improperly or discriminatorily dismissed a clergy member,<sup>77</sup> the rejection of claims of “clergy malpractice,”<sup>78</sup> the invalidation of laws enforcing on kosher merchants a particular interpretation of kosher standards,<sup>79</sup> and so forth.

The problem is a subset of a more general difficulty with copyright law: its various doctrines require a court to make numerous literary and artistic judgments about copyrighted works and their uses. Although such judgments are inevitable, they create some tension with copyright’s goal of providing protection to works without evaluating their merit.<sup>80</sup> Other observers have called attention to this problem in general,<sup>81</sup> but the difficulty is more severe in the religious context. There is a tradition of making certain artistic and literary judgments about secular works for copyright purposes; but there is an equal or stronger tradition that courts may not make theological judgments.

So what is a court to do? The alternatives all seem unattractive. To avoid theological judgments by always deferring to the defendant’s claim is to eviscerate copyright in religious works – again raising the specter of discrimination against such works and the religious plaintiffs who create or own them.<sup>82</sup> Avoiding the issue by

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<sup>76</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981) (holding that the court should not decide whether unemployment claimant properly interpreted demands of his faith even though leaders and other members disagreed).

<sup>77</sup> *See, e.g.*, *Serbian E. Orthodox Dioc. v. Milivojevich*, 426 U.S. 696 (1976); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 804 (4th Cir. 2000); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343, 347-50 (5th Cir. 1999); *EEOC v. Catholic Univ.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

<sup>78</sup> *See, e.g.*, *Nally v. Grace Cmty. Church*, 47 Cal.3d 278, 299 (1988) (“[I]t would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity.”).

<sup>79</sup> *See, e.g.*, *Ran-Dav County Kosher, Inc. v. State*, 129 N.J. 141, 158-61 (1992).

<sup>80</sup> As Justice Holmes first put the point: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations [for copyright purposes], outside of the narrowest and most obvious limits.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

<sup>81</sup> *See, e.g.*, Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 *IND. L. REV.* 175, 231-32 (1990) (“Courts have no philosophical or objective basis on which to rely in trying to distinguish the ideas from the expression in works of art. Thus, the judge’s assessment of the artistic value of the work, a subjective determination that reflects the personal values and background of the judge, has filled the vacuum in infringement determinations.”).

<sup>82</sup> *See, e.g.*, *Religious Tech. Ctr. v. Scott*, 660 F. Supp. 515, 519-20 (C.D. Cal. 1987) (Holding that copyright judgments are impermissibly theological “seems to lead to the conclusion that religious scriptures cannot be protected by copyright. This result is untenable, however. Where the statutory formalities have been met, scriptures must receive the

deferring to the plaintiff creates just the opposite problem.

The following are suggestions that can permit the court to escape the dilemma in many situations, and then a proposal for what the court should do if it is faced with an unavoidable issue that is too theological to decide.

1. Sometimes a court can dodge the problem. Consider example (i) above. Under the fair use doctrine, the analysis of how much of the material the defendant used compared with his critical or journalistic purpose is only one factor among several for the court to consider. Courts in fair use cases commonly say that one fair use factor favors neither party, and so decide the case based on other factors.<sup>83</sup> Indeed, the dissenting judge in *Worldwide Church of God* advocated ignoring the second factor because “as a religious text, Armstrong’s *MOA* defies easy classification . . . as either informational or creative.”<sup>84</sup> Courts could “punt” on whatever factor involves a theological inquiry, treating that as a wash and deciding on the basis of other factors, such as whether the defendant’s use affected the market for or value of the work – which seldom requires theological judgments.

Another device to dodge the issue is available in cases where plaintiff and defendant are on record as sharing the same belief about the status of the scripture in question. If defendant argues that the scripture is literal and inerrant and must be copied verbatim, and plaintiff is on record in the past as making that same theological assertion, plaintiff may now be estopped from asserting that the work is imaginative.<sup>85</sup> Or, if defendant has explicitly treated the work as non-literal in the past, she might be estopped from arguing now that it must be copied verbatim. This device will not work if the parties disagree about the status of the work – as in *Worldwide Church of God*, where the defendant thought the book was scripture and the plaintiff thought it was heresy and therefore at best “imaginative” – or when there is no record of a party’s past assertions about the work.

2. Sometimes the precise nature of the issue permits a court to reach a decision without a theological judgment. For example,

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same protection as other works. [A]ny other result [would] offend the First Amendment’s guarantee of freedom of religion.”).

<sup>83</sup> See William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit Presumptions and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 693-96 (1993).

<sup>84</sup> *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1123 (9th Cir. 2000), *cert. denied*, (Brunetti, J., dissenting).

<sup>85</sup> See *Use of Copyrighted Works for Religious Purposes*, *supra* note 47; *cf. Gutenberg’s Legacy*, *supra* note 47, at 338-39 (suggesting that copyright estoppel might apply to the question whether human claimant was “author” of the scripture).

in *Religious Technology Center v. Scott*,<sup>86</sup> in one of the many copyright disputes involving the Church of Scientology, the question was whether a certain Scientology manual describing a part of the “auditing” procedure was infringed by defendant’s very similar document. The defendant argued that the underlying procedure was an uncopyrightable “process” or “system,”<sup>87</sup> and the similarities in the explanatory documents were just the necessary result of similarities in the procedures. But as the court read the case, this argument against copyrightability involved no assertion about the religious nature of the manual’s text – whether it was inerrant, or what was the central theological tenet in it. Instead, defendant raised an ordinary claim, common in cases about explanatory works, that the text was the simplest and clearest way to explain a similar process and therefore others had a right to copy it. The court said that it could evaluate that claim in secular copyright terms: “[b]oth works deal, not with abstract matters of religious principle, but with concrete applications laid out step-by-step. If A happens, the student auditor is told, do B.”<sup>88</sup> The opinion does not offer enough detail concerning the work to establish whether the court was correct in treating this particular dispute as resolvable in secular terms. But in principle, the reasoning seems sound.<sup>89</sup>

3. Sometimes, a precise understanding of copyright doctrine can help solve the problem with minimal theological judgment. Consider the problem in example (iii) above: a “factual work” receives less broad copyright protection than a “creative” work, which seemingly means that a court must make the impermissible determination whether a scripture is fact or not. But on closer look, the problem vanishes, for to inquire whether a work is “factual” for fair use purposes does not mean to assess whether its assertions are true. When the author of a book about the Hindenburg crash sued the movie producers who made a film recounting the same

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<sup>86</sup> 660 F. Supp. 515 (1987).

<sup>87</sup> 17 U.S.C. § 102(b) (2003).

<sup>88</sup> *Religious Tech. Ctr. v. Scott*, 660 F.Supp. 515, 520 (1987).

<sup>89</sup> Similarly, in many situations there will be no special problem in determining whether the “amount taken” in a religiously motivated use was more than necessary. Cf. example (i). If a religiously motivated biographer wants to criticize the noted atheist Madalyn Murray O’Hair by, among other things, quoting from and attacking her writings, that biographer, no less than the secularly motivated one, “may exceed fair use by quoting more than is necessary to make the biographical or critical point.” LEAFFER, *supra* note 64, at 438. The problem is more likely to arise when the use is not simply religiously motivated commentary, but a distinctively religious use in itself – as in *Worldwide Church of God*, where the defendant alleged that it needed to use the entire *Mystery of the Ages* in its teaching. *Worldwide Church of God*, 227 F.3d at 1113. If a defendant claims that it must use every “jot and title,” *Matthew* 5:18, because it is all inspired, the court still faces the dilemma.

story, the court determined that the book was “factual” in nature and thus entitled to narrower protection against similar works.<sup>90</sup> But that conclusion certainly did not depend on the court finding that the book’s factual assertions (which included a theory of who sabotaged the airship) were accurate. What the court must determine is whether the plaintiff’s work is “informational;” that is, whether its purpose or intention is to convey information, not whether the information is in fact true. Thus the Second Circuit, in *New Era Publications v. Carol Publishing Group*,<sup>91</sup> held that Ron Hubbard’s works, quoted in a biography critical of him, were “informational” in nature and subject more to the fair use defense under the second factor. “[T]he quoted works . . . deal[t] with Hubbard’s life, his views on religion, human relations, the [Scientology] Church, etc.,” and the court said that “on balance” the works were “more properly viewed as informational.”<sup>92</sup> A court could easily decide that the intention of a religious work was to convey spiritual information without determining whether the information is true.

4. Finally, in some cases the interpretation of a religious work required by copyright doctrines may not be very controversial. For example, if a court needs to assess under the fair use doctrine whether the portion of a work taken is at the “heart” of the work,<sup>93</sup> it may be that the work itself explicitly proclaims a certain passage as crucial or central. In such a case, the court does not really have to make its own theological judgment; it can accept the judgment reflected in the work itself.

5. The devices just listed can probably permit a court to escape the dilemma posed by theological judgments in many copyright cases, but not in all. For example, even if a court must only decide whether a work is informational in purpose rather than accurate, nevertheless the court must decide whether “the [work’s] arrangement or expression is not dictated by the nature of the facts themselves.”<sup>94</sup> The same question is key for the merger doctrine.<sup>95</sup> We now hypothesize that the defendant in the *Worldwide Church of God*-type situation asserts that the precise expression is crucial to

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<sup>90</sup> See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980), *cert. denied*, 449 U.S. 841 (1980).

<sup>91</sup> 904 F.2d 152 (2d Cir. 1990).

<sup>92</sup> *Id.* at 157.

<sup>93</sup> See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985) (finding this question relevant to the third fair use factor: the “amount and substantiality” of the portion taken).

<sup>94</sup> I GOLDSTEIN, *supra* note 66, § 8.4.1.4, at 113.

<sup>95</sup> See *generally Kohus v. Mariol*, 328 F.3d 848 (6th Cir. 2003).

the idea because it is dictated by God or because it describes spiritual reality with science-like precision. Accordingly, there may still be situations where it really is unacceptable for the court to decide the case under copyright principles – where a crucial element in the court’s decision would be an independent theological judgment that is simply improper for the court to make.

In such cases of unavoidable theological judgments, I argue that courts should generally defer to the defendant’s claim in the dispute – at least where the defendant has a substantial claim of a religious need to use the work, and plaintiff has refused, or would refuse, to license it at a nonprohibitive price, which was likely to be the situation in *Worldwide Church of God*. Deference to the defendant’s claim fits best with the general balance of equities: barring the defendant’s use of a scripture will prevent or seriously restrict him from practicing his religion, while allowing the defendant’s use will not interfere with the plaintiff’s practice. In other words, the unavoidable theological judgment presents another ground for exempting the defendant from the strict application of copyright law. But before a court reaches this conclusion, it should strive to resolve the case under regular copyright principles by one or more of the means described in this section.

## II. RELIGIOUS USES UNDER THE FAIR USE DEFENSE

Assume, for the reasons above, that religious-use exemptions from copyright law will be infrequent. That brings up the second overarching question: To what extent can a user’s religious needs – such as the need to copy and distribute a text that is one’s scripture – be accommodated under the provisions of the Copyright Act itself? It is important to make room for religious uses in copyright disputes, but constitutional exemptions for such uses may be limited. Therefore, this part of the article develops arguments for how religious uses may be legitimate under the terms of the copyright statute.

Many provisions and doctrines of copyright law limit the protection given to copyrighted works, in various situations, in order to preserve the public’s free access to such works or parts of them. There is the general distinction between copyright-protected expression and unprotected ideas. There are also general defenses such as the “first sale” doctrine of section 109(a).<sup>96</sup> These principles may shelter religious uses, but they generally do not raise dis-

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<sup>96</sup> 17 U.S.C. § 109(a) (providing that the owner of a physical copy of a work may distribute or display that copy without violating copyright owner’s rights).

tinctive issues in that context.<sup>97</sup> At the other end of the spectrum, some of the many specific exemptions in the Copyright Act relate closely to religious uses, in particular the exemption for performances of certain religious works “in the course of services at a place of worship or other religious assembly.”<sup>98</sup> I will refrain from analyzing in detail the interpretive issues raised by those exemptions, in part because they almost all apply only to performances and not to reproductions (i.e., making copies), and therefore do not shelter many of the common religiously motivated uses.<sup>99</sup> Instead, this part focuses on the fair use defense of section 107 and how it might be invoked to shelter religiously motivated copying of scriptures or other texts.

#### A. *Religion and the Illustrative Uses*

As students of the Copyright Act well know, the fair use section begins with a list of illustrative purposes that may qualify a use as noninfringing: “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>100</sup> These purposes are not exhaustive nor conclusive, but are only illustrative; a use that falls within one of these categories must still satisfy the four criteria that follow in sec-

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<sup>97</sup> Except for the question, noted above, of whether and how a court may permissibly interpret a religious work to separate an underlying idea from a particular expression. *See supra* notes 79-94 and accompanying text.

<sup>98</sup> 17 U.S.C. § 110(3).

<sup>99</sup> Thus, a church or synagogue may be able to perform a copyrighted hymn or other work at a religious service, but it is not authorized to make copies of the music and lyrics to distribute to the congregation (at least not under any specific statutory exception). The specific exemptions did not protect the Philadelphia Church copying the scripture that the Worldwide Church had renounced, or a spin-off group from the Church of Scientology publishing a manual on “auditing” similar to the Church’s manual. The religious-services exemption of § 110(3) has other significant limitations. First, it exempts the performance of a “dramatico-musical work” or a literary work, but not of a pure “dramatic work.” Thus it allows the choir to perform a modern oratorio or a musical setting of the mass (a dramato-musical work), and the minister to read a long passage from a C.S. Lewis book during her sermon, but it does not authorize a group of laypeople from the congregation to perform a dramatic work, such as a scene from a play. Second, the provision does not exempt the performance of a work that is not of a religious nature: for example, the reading of a passage from a Harry Potter book in services, followed by a discussion about its theological implications. *See, e.g.*, H.R. REP. NO. 94-1476, at 84 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5698. This is a significant limit on the usefulness of the exemption, since a religious group may well wish to comment on secular works as well as religious works during its services. Finally, the section 110(3) exemption does not cover performances at religious meetings that do not count as “religious services.” Although the scope of that phrase is not clear, it may exclude religious meetings that are different from traditional or familiar religious services.

Many of the holes in the religious-services exemption are plugged by the broader exemptions in section 110(1) for performances in “face to face teaching,” and in section 110(4) for performances by a non-profit organization. But again, these exemptions do not cover reproductions.

<sup>100</sup> 17 U.S.C. § 107, pmb1.

tion 107.<sup>101</sup> But generally, fair use is “much easier to prove” when the use fits within the categories.<sup>102</sup>

Nearly all of the common religiously motivated uses of a scripture or other text should fall within the list of illustrative purposes. Some religious uses will be “criticism” or “commentary,” others “scholarship” or “research.” Most importantly, the use of a scripture for study, devotion, or evangelizing, as in *Worldwide Church of God*, should comfortably qualify as “teaching.” In *Worldwide Church of God*, the defendant Philadelphia Church asserted that it needed to copy and distribute *The Mystery of the Ages* for the purpose of “educating and baptizing new members, training new pastors, and disseminating the Word to the public.”<sup>103</sup> These are “teaching” and “research” uses under the preamble – as indeed should be the case with any copying for use in a church-related school or class, whether in a weekday school or a specifically religious Sabbath school. Teaching a religious faith is still teaching. Even outside of a school setting narrowly defined, much religious copying and distribution will be for purposes explicitly mentioned in the fair use section. For example, if during a worship service the clergyman distributes a paragraph from a book in order to refer to it in his sermon or homily, this use should qualify as either “criticism, comment, [or] teaching” within the preamble list.<sup>104</sup>

If this conclusion is not simply common sense, it also follows from the fact that when religious activity is at issue, the definition of teaching must be interpreted generously rather than narrowly. In *Good News Club v. Milford Central School*,<sup>105</sup> for example, the Supreme Court held that a student religious club that engaged in “singing songs, hearing a Bible lesson and memorizing scripture” constitutionally must be allowed to meet in elementary school classrooms on equal terms as other student clubs.<sup>106</sup> According to school district policy, the rooms were available for discussion or instruction regarding “development of character and development of morals.”<sup>107</sup> The Court held that as a constitutional matter, the phrases “moral and character development” or “moral and charac-

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<sup>101</sup> See LEAFFER, *supra* note 64, § 10.5, at 430; *see id.* § 10.6, at 432.

<sup>102</sup> *See id.* § 10.6, at 432. More precisely, if the use fits within the illustrative list, there is a “strong presumption” that the first of the four analytical factors in the fair use section – “the purpose and character of the use” – favors finding the use to be fair. *See Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991).

<sup>103</sup> Brief for the Philadelphia Church of God at 34, *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110 (9th Cir. 2000) (Nos. 99-55850, 99-55934, and 99-56005).

<sup>104</sup> 17 U.S.C. § 107 (2003).

<sup>105</sup> 533 U.S. 98 (2001).

<sup>106</sup> *Id.* at 103.

<sup>107</sup> *Id.* at 104.

ter instruction” had to encompass the religious teaching and evangelism practiced in the Good News Club. Although the meetings were “quintessentially religious in nature,” they could “also be characterized properly as the teaching of morals and character development from a particular viewpoint” – a religious one.<sup>108</sup> Therefore, the exclusion of the club from the category of “moral and character instruction” was a form of viewpoint discrimination, virtually always a violation of the First Amendment.

By the same principles, most forms of religious worship or evangelistic meeting involve teaching of the faith – to existing adherents or potential converts – and must be considered as “teaching” within the illustrative uses of section 107. If any court is inclined to read “teaching” in the section narrowly, *Good News Club* should dissuade it from doing so. Indeed, copyright cases in general are even clearer than *Good News Club*: the forum in the latter had a subject-matter restriction into which the religious activity had to fit (although the Court ultimately held that it did), while in copyright cases, the fair use categories are broader and encompass “teaching” (or “comment” or other uses) on any subject matter. An equally close precedent, therefore, is *Rosenberger v. Rector and the Visitors of Univ. of Virginia*,<sup>109</sup> which held that a state university violated the Free Speech Clause by excluding a religious student publication from funding, which was available to a plethora of student publications on a wide range of subjects.

#### B. *Religion and the Four Statutory Factors*

Under the fair use section, even if the defendant’s use fits within the listed examples, such as teaching, the particular use must still be judged under the four analytical factors set forth in the statute.<sup>110</sup> Those factors include “the purpose and character of the use,” “the nature of the copyrighted work,” “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>111</sup> Although the four factors must be satisfied, recognizing many religious uses as “teaching” helps explain why the fair use factors are satisfied and can counter contrary arguments.

For example, in *Worldwide Church of God*, the Ninth Circuit made much of the fact that the defendant Philadelphia Church

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<sup>108</sup> *Id.* at 111.

<sup>109</sup> 515 U.S. 819 (1995).

<sup>110</sup> *See* 17 U.S.C. § 107 (2003).

<sup>111</sup> *Id.*



had merely copied the Armstrong book, without adding any textual content of its own.<sup>112</sup> The court weighed this fact against finding fair use on the first statutory factor, the purpose and character of the use. The importance of the defendant's additions to the original work was emphasized by the Supreme Court in *Campbell v. Acuff-Rose Music*.<sup>113</sup> The Court said that it is important, though not absolutely required, that the use be "transformative."<sup>114</sup> Similar to a parody, the use should "ad[d] something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>115</sup> The creation of "transformative works" furthers "the goal of copyright, to promote science and the arts."<sup>116</sup>

"Teaching," however, is a context in which a user helps promote knowledge merely by using the work's verbatim text, without transformation, for discussion purposes. The contribution to knowledge from teaching typically lies, as one of the leading copyright treatises recognizes, "not within the copy's four corners, but in the advancement of knowledge generally."<sup>117</sup> Indeed, it is often important to read the work, for teaching purposes, in its original form in order to be familiar with and understand it. The fair use section implicitly recognizes this feature of teaching by explicitly mentioning the making of "multiple copies for classroom use,"<sup>118</sup> a provision that the Supreme Court in *Acuff-Rose* referred to as "[t]he obvious statutory exception to this focus on transformative uses."<sup>119</sup> The logic of the classroom-copying exception is not limited to that context. It applies to any teaching situation in which examination of the complete original is important for study or discussion. Indeed, the Supreme Court in *Sony* reasoned that a teacher's action is "clearly productive" – a synonym for "transformative," according to the Court – under the fair use doctrine when he "copies for the sake of broadening his personal understanding of his specialty," even if he does not prepare a new work based on the copy.<sup>120</sup>

The use of a scripture for religious study and devotion is a pointed example of simple copying that promotes knowledge and thus is productive in the sense contemplated by fair use. It is often

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<sup>112</sup> See *Worldwide Church of God*, 227 F.3d. at 1117 ("PCG's copying of WCG's *MOA* in its entirety bespeaks no 'intellectual labor and judgment.' It merely 'supersedes the object' of the original *MOA*, to serve religious practice and education.")

<sup>113</sup> 510 U.S. 569 (1994).

<sup>114</sup> *Id.* at 579.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> 2 GOLDSTEIN, *supra* note 38, §10.2.2, at 10:63.

<sup>118</sup> 17 U.S.C. § 107, pmb1.

<sup>119</sup> *Acuff-Rose*, 510 U.S. at 579 n.11.

<sup>120</sup> *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 n. 40 (1984).

crucial for religious adherents to read and study a scripture in its original form, since they commonly believe that particular words are divinely inspired or have unique spiritual meaning. Copyright law recognizes that teaching a work in its original form itself promotes knowledge; therefore, under *Good News Club* and basic free exercise principles, a court may not conclude that religious study does not in itself promote knowledge. Any such conclusion would reflect that this interpretation contributes to a negative judgment about religious teaching. It would “devalue religious reasons for” copying and teaching “by judging them to be of lesser” value in promoting knowledge.<sup>121</sup> The lack of transformation in the copying of a scripture should not directly cut against the religious defendant, as it did in *Worldwide Church of God*.<sup>122</sup>

A scant element of transformation may properly relate to another one of the fair use factors: “the effect of the use upon the . . . value of the copyrighted work.”<sup>123</sup> The lack of transformation may indicate that the defendant’s use will cause the exhaustion or satisfaction of demand for the work and the consequent loss of return to the copyright owner, which is the primary harm that copyright is meant to prevent.<sup>124</sup> This is because the closer the defendant’s use is to the original, the more likely it may serve as a substitute for it.<sup>125</sup> The copyright owner should be entitled to prevent such substitution or exhaustion of demand even when the defendant’s use is religiously motivated.

A similar argument applies to the fact that the defendant copied the entire work, which is another factor emphasized by the court in *Worldwide Church of God*.<sup>126</sup> The court held that this fact weighs significantly against the defendant under the third factor: “the amount and substantiality of the portion [of the work] used.”<sup>127</sup> Although the point fits under this factor, there is a strong argument that it should not bear the weight that the Ninth Circuit panel gave it. The Supreme Court in *Acuff-Rose* emphasized that this factor should be considered “in the context of the purpose of the use.”<sup>128</sup> For example, in *Acuff-Rose*, a parody should be able to

<sup>121</sup> *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993).

<sup>122</sup> 227 F.3d 1110 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001).

<sup>123</sup> 17 U.S.C. § 107 (2003).

<sup>124</sup> *See Acuff-Rose*, 510 U.S. at 591 (stating that “when a commercial use amounts to mere duplication . . . it [is] likely that cognizable market harm to the original will occur,” but that when “the second use is transformative, market substitution is at least less certain . . .”).

<sup>125</sup> *See id.*

<sup>126</sup> 227 F.3d 1110 (2000).

<sup>127</sup> *Id.* at 1118-19.

<sup>128</sup> *Acuff-Rose*, 510 U.S. at 586-87.

borrow more of the original work in order to “conjure it up.”<sup>129</sup> Likewise, religious defendants should be able to argue that because they view their scripture as divinely inspired, they have a distinctive need to study (and perhaps copy) the entire work. In some contexts the fair use defense has permitted copying the entire work. For example, *Sony* permits the home videotaping of TV programs.<sup>130</sup>

But again, the amount copied may be relevant to the fourth fair use factor. Copying a large portion of the original is more likely to exhaust demand for the plaintiff’s work.<sup>131</sup> However, in *Sony*, the Court emphasized that for various reasons home taping for “time shifting” purposes would not regularly deprive the TV-producer plaintiffs of any return on their works.<sup>132</sup> If religious uses must be treated similar to secular uses that have the same effect on others, then a religious defendant would be entitled to copy a full scripture if, but only if, the copying would not harm the plaintiff’s return by satisfying demand for copies of the text.

Thus far, I have argued that a court in a religious fair-use case should concentrate primarily on the fourth factor: the effect of the use on the value of the plaintiff’s work. In fact, the Supreme Court has said that the effect on the value of the work is “undoubtedly the single most important element of fair use.”<sup>133</sup> Focusing on the final factor, a court can keep copyright down to manageable size, limiting it to those cases in which the defendant’s use causes a real, direct harm to the copyright owner. Of course, any unauthorized use of the work could be considered a harm if the premise is that the copyright owner has a right against all unauthorized uses. But that “*reductio ad absurdum*” does not strike the proper balance, for under it “few uses will ever qualify as fair.”<sup>134</sup> Instead, in the words of a leading copyright treatise, courts should, and do, “dra[w] a practical and principled line between those uses that threaten the potential market . . . and those that do not, by focusing on the concept of ‘the normal market for the copyrighted work.’”<sup>135</sup> Those uses that harm the “normal market” for the work are the “core” cases of copyright infringement that are not protected as

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<sup>129</sup> *Id.* at 588.

<sup>130</sup> See *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984) (holding that home taping of TV shows for “time shifting” purposes is a fair use).

<sup>131</sup> See *Acuff-Rose*, 510 U.S. at 587-88 (stating that the amount of original taken is relevant to whether second use “may serve as a market substitute for the original”) (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1123 (1990)).

<sup>132</sup> See *Sony*, 464 U.S. at 417.

<sup>133</sup> *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985).

<sup>134</sup> 2 GOLDSTEIN, *supra* note 38, § 10.2.2, at 10:62.

<sup>135</sup> *Id.*

fair use; and for which there should be no religious exemption from copyright liability.<sup>136</sup>

However, the question of effect on demand for the plaintiff's work is a complicated one. In its analysis of this question, the *Worldwide Church of God* panel again erred. The defendant Philadelphia Church argued that there was no harm to the Worldwide Church's return because the Worldwide Church did not wish to market *The Mystery of Ages*, but rather wanted to suppress it. The court rejected this argument, primarily on the ground that the Worldwide Church asserted that it planned to release a new version of the text, "annotated" with criticisms, and the Philadelphia Church's copies might exhaust demand for the annotation.<sup>137</sup> The court's reasoning fails first because the annotated edition was completely speculative;<sup>138</sup> if a court does not look behind such assertions, it will rubber-stamp injunction claims brought simply to suppress opposing views, thinly covered with pretexts of "future publishing plans." Second, as the dissenting judge pointed out, even if the plaintiff's "critical" edition were in fact planned, to say that people's demand for a negative discussion of a work will be satiated by a positive, even worshipful, discussion of it is ludicrous.<sup>139</sup> In the converse situation, where the plaintiff's work is followed by a criticism of it in the form of defendant's parody, the Supreme Court in *Acuff-Rose*<sup>140</sup> has reasoned that "the new work will [likely] not affect the market for the original . . . by acting as a substitute for it, . . . because the parody and the original usually serve different market functions."<sup>141</sup>

More likely, the reason that the "critical" edition would be harmed would be that people reading defendants' copies of *Mystery of the Ages* would believe in the book, and therefore would not want a forthcoming critique of it. However, this sort of harm should not

<sup>136</sup> See discussion *supra* Part I.B.

<sup>137</sup> See *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1119 (9th Cir. 2000) *cert. denied*, 532 U.S. 958 (2001).

<sup>138</sup> See *id.* at 1124 (Brunetti, J., dissenting) ("[T]he failure of WCG to make any reasonable progress on the annotation over the course of a decade as well as WCG's belief that it has a Christian duty to keep Armstrong's doctrinal errors out of circulation tends to undermine the credibility of WCG's intention to publish any such annotation.").

<sup>139</sup> See *id.* (citing *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986)). In *Maxtone-Graham*, the court upheld a fair use defense raised by a defendant whose editorial viewpoint was very much the opposite of the plaintiff's: "[I]t is unthinkable that potential customers for a series of sympathetic interviews on abortion and adoption would withdraw their requests [for a second edition] because a small portion of the work was used in an essay sharply critical of abortion." *Maxtone-Graham*, 803 F.2d at 1264. Setting aside the "small portion" point, the same argument about opposing viewpoints applies in *Worldwide Church of God*. *Worldwide Church of God*, 227 F.3d at 1110.

<sup>140</sup> 510 U.S. 569 (1994).

<sup>141</sup> *Id.* at 591.

support copyright liability. The Court in *Acuff-Rose*<sup>142</sup> made clear that when a “lethal parody” of a work reduces demand by convincing people the work is worthless, it is simply effective, “biting commentary,” not actionable under copyright. It is not “market substitution” – or the “superseding” or “usurping of demand” – which is the harm at which copyright aims.<sup>143</sup>

The situation in *Worldwide Church of God* is analogous. If the defendant’s use reduced demand for the plaintiff’s projected critical annotation, it did so not by usurping or satisfying the demand for that viewpoint, but by winning people to an opposing point of view. While the defendant’s use might have usurped demand (in the core copyright sense) for the original work of *Mystery of the Ages*, the plaintiff was not seeking to capture that demand. It wanted to suppress demand for that work instead of exploiting it. The case is a converse of the parody situation, but it is also parallel to it. The fact that the defendant did not turn people ideologically against the original work, but against a future critique of the original work, should make no difference: the nature of the competition between the two parties is still ideological.<sup>144</sup> And in both cases – parody and the *Worldwide Church of God* situation – the plaintiff would likely refuse to license the work precisely because of this ideological disagreement. These same answers apply to the Ninth Circuit’s argument that the Worldwide Church might lose members (and thus financial support) to the Philadelphia Church because of the latter’s use of *Mystery of the Ages*.<sup>145</sup> Such effects would occur, if at all, because people were more convinced by the Philadelphia Church’s views than the Worldwide Church’s views. Copyright law, properly interpreted, does not prevent such effects.

The proper result in *Worldwide Church of God* depends, however, on the fact that the plaintiff was not distributing the original

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<sup>142</sup> *Id.* at 569.

<sup>143</sup> *Id.* at 591-92.

<sup>144</sup> To be sure, *Acuff-Rose* suggested that the distinction between ideological conversion and market substitution corresponds to the distinction between “transformative use” and “mere duplication.” See 510 U.S. at 591 (“[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly . . . serves as a market replacement for it . . . . But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”). But in a situation such as *Worldwide Church of God*, even the simple reprinting of the original wins demand simply by ideological conversion. Note that *Acuff-Rose* refers to “a commercial use that amounts to mere duplication.” *Id.* (emphasis added). In addition, the key features of ideological competition, and market effects through ideological conversion, are much more likely to be present in noncommercial or nonprofit contexts, which is part of the reason that fair use is more likely in these contexts. See *id.*

<sup>145</sup> *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1119 (9th Cir. 2000), *cert. denied*, 532 U.S. 958 (2001).

work. In cases where the plaintiff is distributing the work, he or she is much more likely to be able to claim copyright-type harm, from the exhaustion or satisfaction of demand for the work. Consider a simple example. In *Bridge Publications v. Vien*,<sup>146</sup> one of the many copyright-infringement suits brought by the Church of Scientology, the defendant had copied secret documents used in Scientology training classes in order to offer a competing course that appeared to involve essentially the same training as the Scientology classes.<sup>147</sup> That fact, coupled with the commercial element pervading both Scientology and the defendant's course, suggests that the element of exhaustion of demand entirely predominated there, and that there was little or no element of ideological competition. This is a "core" example of copyright-type harm. Therefore, the fact that the defendant's activities were religiously motivated should provide no basis for a fair use defense – or, as discussed above, for a religious-use exemption under the Constitution or RFRA.<sup>148</sup>

However, other religious copyright cases "may have a more complex character," analogous to what the Supreme Court recognized in *Acuff-Rose*.<sup>149</sup> There the Court acknowledged that a parody may have "effects not only in the arena of criticism but also in protectible markets."<sup>150</sup> Similarly, where the plaintiff markets a religious text and a religiously-motivated defendant copies it, the effects may occur both because of argument from a competing viewpoint and because of simple exhaustion of demand for the plaintiff's own work.

These cases will be the hardest to resolve: granting the plaintiff relief may suppress an alternative religious viewpoint, but denying relief may allow the very harm, exhaustion of demand, that

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<sup>146</sup> 827 F. Supp. 629 (S.D. Cal. 1993).

<sup>147</sup> *Id.* at 635 ("The uncontroverted evidence shows that defendant uses the copyrighted works as an integral part of the Dynamism courses she sells to her students.").

<sup>148</sup> *See id.* at 635-36 (rejecting fair use defense "as a matter of law"). Another easy case, though it is quite infrequent, might be called "copyright sabotage." Imagine that defendant opposes plaintiff's organization for religious reasons (where plaintiff may be religious or secular), and therefore defendant copies and distributes plaintiff's copyrighted works so as to undercut plaintiff's profits and harm it. (Such behavior is self-limiting, of course, since defendant will thereby be disseminating ideas that it likely opposes. But imagine that defendant opposes only some of plaintiff's ideas and is willing to allow others to be disseminated if it will harm plaintiff.) This case likewise involves "core" copyright harm: the goal and result are simply to reduce plaintiff's return by exhausting demand for the work. The fact that defendant's ultimate motive (for opposing plaintiff) is religiously based provides no ground for a fair use defense or for any constitutional exemption. *See, e.g., Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.* 923 F. Supp. 1231 (N.D. Cal. 1995).

<sup>149</sup> 510 U.S. at 592.

<sup>150</sup> *Id.*

copyright was intended to prevent. And the two effects may be difficult to distinguish, for a couple of reasons. First, when the plaintiff does not directly sell the work itself – typically in the nonprofit context – it may be difficult to distinguish demand for the work from interest in the plaintiff’s religious viewpoint. Second, when the defendant’s use does not facially add content to the work, it may be difficult to determine whether defendant is reducing demand by presenting an alternative viewpoint or is simply satisfying demand. *Worldwide Church of God* was a clear case of such a dissenting viewpoint, but other cases may not be so clear.

One possible copyright-law solution for such difficult cases is considered by Tom Cotter and is being increasingly suggested for copyright cases generally: award damages but deny an injunction.<sup>151</sup> This has the advantage of permitting the defendant to use the crucial scripture, while preserving a return for the plaintiff on its work. The calculation of damages may be difficult, of course; and whether such a solution becomes a general option under copyright law remains to be seen. But the damages solution fits particularly well with one aspect of the law of religious freedom. To use the phraseology of the Religious Freedom Restoration Act,<sup>152</sup> requiring the defendant to pay damages only is a “less restrictive means” of protecting the plaintiff’s return on its work than is enjoining the defendant from using a text that may be crucial to the practice of its faith.

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<sup>151</sup> See, e.g., *Use of Copyrighted Works for Religious Purposes*, *supra* note 47; see also *Gutenberg’s Legacy*, *supra* note 47, at 385-86; see also *Acuff-Rose*, 510 U.S. 578 (cautioning against “automatically granting injunctive relief” in cases “raising reasonable contentions of fair use” where “the copyright owner’s interest may be adequately protected by an award of damages for whatever infringement is found”) (quotations omitted); see also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (vacating preliminary injunction against book parodying *Gone with the Wind*, partly because of serious fair-use defense, but partly because injunction is disfavored prior restraint and money damages would be adequate); Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L. J. 147 (1998).

<sup>152</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (1993).

